United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1900.

No. 1004.

25

ALICE R. MOSHEUVEL AND ANTHONY J. MOSHEUVEL, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 14, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 19, 1900.

In the Court of Appeals of the District of Columbia

ALICE R. MOSHEUVEL ET AL., Appellants,
vs.
THE DISTRICT OF COLUMBIA. } No. 1004.

a Supreme Court of the District of Columbia.

ALICE R. MOSHEUVEL ET AL.
vs.
THE DISTRICT OF COLUMBIA. } No. 43323. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed September 7, 1899.

In the Supreme Court of the District of Columbia.

ALICE R. MOSHEUVEL and ANTHONY J. Mosheuvel, Her Husband, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 43323.

The plaintiffs, Alice R. Mosheuvel and Anthony J. Mosheuvel, who are husband and wife, sue the defendant, The District of Columbia, which is a municipal corporation having in charge the streets, avenues, and other public highways of the city of Washington, District of Columbia, for that on, to wit, the 7th day of August, A. D. 1899, and for a long time prior thereto there was and still is a certain common and public highway or street in said city of Washington and District of Columbia known as E street northeast, which was and is used as such by the residents and inhabitants of said city and District for passing and repassing on and over the same, and for that the defendant, well knowing the premises, was bound to keep the said highway or street in such condition as that the same might and should be safe and convenient for the passage of such persons on, over, and across the same; yet that, nevertheless, on, to wit, the day and year afore-

said, and for a long time prior thereto, to wit, for the period of one year, the said highway or street was out of repair and in a dangerous and unsafe condition by reason of the negligence and default of the said defendant, of all
2 of which the said defendant had notice, in this, that on the south side of the said highway or street between First and Second streets northeast, immediately in front of the residence of the plaintiffs, which was then and now is known as 113 E street northeast, in said city, there was a certain deep and dangerous hole in the sidewalk thereof caused by the negligent and wrongful failure of the defendant to provide a cap or cover for a certain water box or plug in said sidewalk at the place aforesaid, as it was its duty to do, although said defendant had notice that said water box or plug was not provided with a cap or cover, as aforesaid, which said sidewalk, part of said highway or street aforesaid, the defendant, not performing and regarding its duty in the premises, wrongfully and negligently permitted and allowed to be in a dangerous and unsafe condition and out of repair, as aforesaid, unguarded and without fixing or placing or causing to be fixed or placed any warning thereof or protection against the same, by means and in consequence of which the female plaintiff, then and there, on the day and year aforesaid, while leaving or about to leave her residence aforesaid, and while stepping or about to step on said sidewalk and while exercising due care and diligence in so doing, stepped or slipped into said hole aforesaid, and was thereby thrown down to and upon the said sidewalk, highway, or street, and her left ankle and leg and the bones and muscels thereof were severely and seriously bruised, wrenched, twisted, sprained, and otherwise injured, and her said ankle and leg became and were diseased and unsound; and said female
3 plaintiff was further injured internally and permanently, and became and was and still is and will in the future continue to be unable to use her said ankle and leg, and became and was and still is seriously and permanently injured, both in her said ankle and leg and internally, as aforesaid; and by means whereof she became and was thence hitherto and still is sick, sore, lame, and disordered, and will continue to be sick, sore, lame, and disordered, and was and is permanently crippled and from thence hitherto has suffered and will in the future continue to suffer great pain and anguish, both physical and mental; and by means whereof the said female plaintiff during all that time was wholly hindered and disabled and will in the future continue to be wholly or partially hindered and disabled from following her calling and occupation, to wit, that of seamstress, from which she had theretofore derived great gains, to wit, $60 a month, and from which she would have continued to derive great gains but for the wrong and injury aforesaid; and by reason of the premises the plaintiffs claim of the said defendant the sum of ten thousand dollars ($10,000), besides the costs of this suit.

CHAS. COWLES TUCKER,
Attorney for Plaintiffs.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the
4 day and date of the service hereof; otherwise judgment.

CHAS. COWLES TUCKER,
Attorney for Plaintiff.

Defendant's Plea.

Filed September 23, 1899.

In the Supreme Court of the District of Columbia.

ALICE R. MOSHEUVEL and ANTHONY H. Mosheuvel, Her Husband,
vs.
THE DISTRICT OF COLUMBIA.
} At Law. No. 43323.

The defendant, for plea to each and every count of the plaintiffs' declaration filed herein, says it is not guilty in manner and form as alleged.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys for Defendant.

Joinder of Issue.

Filed September 23, 1899.

In the Supreme Court of the District of Columbia.

ALICE R. MOSHEUVEL and ANTHONY H. Mosheuvel, Her Husband, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant.
} At Law. No. 43323.

The plaintiffs join issue upon the plea of the defendant
5 filed herein.

CHAS. COWLES TUCKER,
Attorney for Plaintiff.

Memorandum.

April 24, 1900.—Verdict for defendant.

Supreme Court of the District of Columbia.

SATURDAY, *May* 12, 1900.

Session resumed pursuant to adjournment, Mr. Justice Cole presiding.

* * * * * * *

ALICE R. MOSHEUVEL and ANTHONY J. Mosheuvel, Her Husband, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant.
} At Law. No. 43323.

The motion for a new trial filed herein not having been submitted to the court within fifteen days after verdict, as provided by the rules of court, it is considered that the same be, and hereby is, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiffs take nothing by their suit and that the defendant go thereof without day and recover against the plaintiffs its
6 costs of defense, to be taxed by the clerk, and have execution thereof.

MONDAY, *May* 14, 1900.

Session resumed pursuant to adjournment, Mr. Justice Cole presiding.

* * * * * * *

Chief Justice Bingham.

ALICE R. MOSHEUVEL ET VIR, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant.
} At Law. No. 43323.

Now again come here the plaintiffs, by their attorneys, and tender to the court here their bill of exceptions taken during the trial of this case, and pray that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

7 *Bill of Exceptions.*

Filed May 14, 1900.

In the Supreme Court of the District of Columbia.

ALICE R. MOSHEUVEL and ANTHONY J. Mosheuvel, Her Husband, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant.
} At Law. No. 43323.

At the trial of the above-entitled cause, before the Honorable Edward F. Bingham, chief justice of said court, and a jury regularly impanneled to try the said cause, the plaintiffs, to maintain the issue upon their part joined, offered and gave evidence as follows:

The female plaintiff testified, on direct examination, as follows:

That her husband's name was Anthony J. Mosheuvel and is her coplaintiff in said cause; that her age was thirty years, and she had been married thirteen years; that in August, 1899, she lived in premises known as # 113 E street N. E., in the city of Washington, District of Columbia; that she had then lived there about nine months; that the house was a very nice little house, only there were too many steps; that she did not know how many steps there were

from the pavement up to the front door, but would judge there were three steps from the pavement to a little brick landing and eight steps from the brick landing to the front door; that there was a fence in front of the house, and that there were no other means
8 of going into the street, except by the two or three steps leading onto the sidewalk; that on the 7th of August, 1899, witness left her house between three and four o'clock p. m. to go visiting a friend of hers, Mrs. Simpson, who lived at #117 E street, the second door east of the witness's house; that witness started to go out to Mrs. Simpson's, and in going down the steps witness's left foot slipped right into a hole, which threw her violently on the pavement; that the hole in which the plaintiff's foot slipped was caused by a square water box, which had no top or cover on it; that the water box was not even with the sidewalk. but projected up, being higher up from the pavement on one side than on the other. Witness identified two photographs (which are made parts of this bill of exception), as correctly representing the situation of the front steps and the water box.

The witness further testified that as nearly as she could judge the water box was about five inches square, more or less; that on one side it projected up from the sidewalk about an inch and a quarter, and on the other side not so high; that the inner edge of the box, as near as witness could judge, was about six inches from the inner edge of the last step; that it looked to the witness as if the box was about in the middle of the step; that on the 7th of August the box had no top or cover, and it had been in that condition as long as witness had lived in the house—for about nine months before the accident. The witness further testified that on February 16th, 1899, she wrote a letter to the health department in regard to certain plumbing defects in the house, and in response thereto an in-
9 spector came to the house the following day; that the box was in the condition described when the inspector was at the house; that she knows he saw it by a remark that was made. Witness further testified that her left foot went into the hole as she was in the act of going east to the house of the neighbor mentioned; that witness saw a lady stumble over the same place in the beginning of the summer of 1899, and had she not caught the fence she would have fallen on her face; that witness was very severely hurt in the left foot, and suffered severe internal injuries; that the doctor put witness's foot in splints, and afterwards in a plaster case, and witness has used crutches or a crutch ever since; that she suffered a very great deal, not only in her foot but in her abdomen, and has been unable to do any work; that before she was hurt she did dressmaking, having a very nice trade, and would [redacted] not less than $30.00 per month; that she has been unable to do dressmaking since she was hurt, and has been unable to run a machine; that since she was hurt her sufferings have been very intense and constant, and she has no use of her left leg at all and cannot use it, and wears a rubber bandage on her ankle.

On cross-examination the witness testified that she lived in the

ALICE R. MOSHEUVEL and ANTHONY J. Mosheuvel, Her Husband, Plaintiffs,
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6 costs of defense, to be taxed by the clerk, and have execution thereof.

MONDAY, *May* 14, 1900.

Session resumed pursuant to adjournment, Mr. Justice Cole presiding.

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Chief Justice Bingham.

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That her husband's name was Anthony J. Mosheuvel and is her coplaintiff in said cause; that her age was thirty years, and she had been married thirteen years; that in August, 1899, she lived in premises known as # 113 E street N. E., in the city of Washington, District of Columbia; that she had then lived there about nine months; that the house was a very nice little house, only there were too many steps; that she did not know how many steps there were

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On cross-examination the witness testified that she lived in the

house about nine months before she was injured; that witness did not inspect the house before renting it, but her husband did; that she noticed the water box on the first day she moved in the house; that there was no difference in its condition between the day of the accident and the day she first saw it, unless the bricks around the box had swollen a little; that the box was
10 square and about five or six inches in diameter; that it was hollow, but witness did not know how deep it was; that witness always watched out for the box, because she thought it was a dangerous place; that she could not say exactly how often she would pass down and up the steps in the course of the day as a rule, but did not do it so very often, because it was not very often that she went outside of the house; that some days she would not go out at all, and perhaps the next day would go out, but perhaps not until the day after; that she would notice the box on going out and coming in and always tried to watch out for it, because she knew it was a dangerous place; that in order to avoid it she tried to be a little careful in seeing where she was going; that she was no more careful one time than she was another; that every time she looked at it in the same way and tried to avoid it in the same manner, and that she always succeeded in avoiding it except once when her heel slipped and the time she was injured; that on the occasion when her heel slipped she was not thrown; that she could not exactly say whether she was in the habit of trying to step over and onto the sidewalk or step out alongside of it; that sometimes she would go to the side and sometimes would step over it either to the right side or to the left side; that if you were going either to the right or to the left it was not in your way; that assuming that witness were to pass over the very place where the box was in stepping down from the bottom step, it would require to go over it an unusually long step—that is, different from the witness's ordinary step; that it all
11 depended upon which direction witness was going, but in going in the direction that required her to pass over it she would have to take an unusually long step all the time; that when witness stepped over the box, as she would sometimes do, witness judged she would have to take an unusually long step; that on the occasion when the witness's heel slipped she attempted to step over it and did not succeed; that after stepping down she did not step out far enough to get her heel beyond it; that she was looking out for the box at all times; that the water box could be seen from the time you started to leave the house; that it was in view all the time from the time you started off the porch at the front door until you reached the pavement; that the day on which the accident happened was a fair day; that when witness started out to walk down the steps that day she saw the water box; that she saw it when she was going from the front porch; that she did not keep her eye on it all of the time she was descending, but had her mind on it and was perfectly conscious of its existence there, and that it was a dangerous hole; that when she came down the steps going to her neighbor's house she would have to turn to the east, which was to witness's

right; that witness judges the water box was about in the center of the steps; that she could not say how wide the steps were, but would say that it was somewheres near about as wide as the door in the court-room (indicating); that when witness got to the bottom step and when she was stepping down on the sidewalk she tried to be as careful on that day as she was on any other day; that she tried to be careful when she saw the box was there and tried to avoid the box every time; that she attempted on this occasion to make a turn to go to her right.

12 The witness further testified in response to the question, "Did you try to make a step of such length as would carry your foot over the box?" "I tried; the same as always."

Q. "But you fail to know exactly what you did this time? Did you try to step over this box?"

A. "First I thought my steps were even and would carry me over the box."

Q. "So you tried to take a step long enough to carry you over the box?"

A. "Yes, sir; I did."

Q. "But you miscalculated and your toe caught in the box?"

A. "Yes, sir; my toe caught in the box, which threw me to the pavement."

Q. "Which foot were you putting down first when you came to the bottom step?"

A. "My right foot was on the last step and I turned to put my left foot down."

Q. "Did you attempt to turn before you got off the last step?"

A. "No more than that I was coming off this step and I started to walk and turned, of course."

Q. "Did your foot go in the box sideways?"

A. "That way (indicating). My toes went down."

Q. "Did your foot go in the box parallel with the steps?"

A. "No, sir; cornerways."

Q. "Diagonally, you mean?"

A. "Yes, sir."

13 Q. "So that you had started to run when you got on the last step?"

A. "I had my right foot on the last step and went to put my left foot down and my foot went cat*a*-corner in the box."

The witness further testified that there was nothing different about the box that day from the day she first noticed it unless the bricks had sunk a little to the side of the box; that she did not notice whether it had or not, but found out afterwards that it was an inch and three-quarters higher on the pavement on one side and a little above the pavement on the other; that whether witness would pass to the right or to the left of the box in going off the step would depend upon which direction she was going; that sometimes she would pass to the right, sometimes to the left, and sometimes would step over the box; that the accident occurred in summer, and after she got through with her work she would sit on the porch and would

always see the water box; that when the plumbing inspector came in response to witness's letter witness did not call his attention to the water box—he saw it himself; that witness had not gone outside of her door before the accident on the day it had occurred; that up to the time she fell she had not been out of the house for about a week; that she saw the box the last time she was out; that prior to the accident she spoke to her neighbors about the dangerous condition of the water box; that on the day when she went down the steps she had nothing in her hands.

14 The plaintiffs, to further maintain the issue on their part joined, offered and gave evidence tending to show that the water box in question had been without a top or cover for at least two years prior to the accident, and also medical evidence tending to show the character and extent and probable permanency of the female plaintiff's injuries, and there rested.

After the plaintiffs had so rested the defendant offered and gave evidence tending to show that the three front steps, at the foot of which said water box was located, were 3 feet 8 inches in width; that the dimensions of the said water box were 4 inches by 4 inches; that the east side of said water box was 16 inches from the east end of said steps, and the west side of said water box was 24 inches from the west end of said steps; that the north side of said water box was 4 inches from a line drawn from the tread of said steps nearest the sidewalk to the ground, and that a person 5 feet tall could see the water box in question while standing on the porch at the front door of said premises; and the said defendant also produced and offered in evidence a photograph and a plat of the locality of the said accident, which are made parts of this bill of exceptions, and there rested. And thereupon the defendant prayed the court to direct the jury to return a verdict for the defendant, and the court granted said prayer and so instructed the jury; to which direction and ruling of the court the plaintiffs, by their attorneys, excepted, and prayed the court to sign, seal, and enroll this their bill of exceptions according to the form of the statute in such case made and provided,
15 which is accordingly done this *day of* 14th day of May, 1900, now for then.

E. F. BINGHAM, *C. J.* [SEAL.]

Settled by consent.

A. B. DUVALL,
Attorney for Defendant.
DAVIS & TUCKER,
Attorneys for Plaintiffs.

Order for Appeal.

Filed May 16, 1900.

In the Supreme Court of the District of Columbia, the 16th Day of May, 1900.

ALICE R. MOSHEUVEL ET VIR, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 43323.

The clerk of said court will enter an appeal to the Court of Appeals by the plaintiffs from the judgment heretofore rendered in the above-entitled cause.

DAVIS & TUCKER,
Attorney- for Plaintiffs.

16 *Waiver of Citation.*

Filed May 16, 1900.

In the Supreme Court of the District of Columbia, the 16th Day of May, 1900.

ALICE R. MOSHEUVEL ET VIR, Plaintiffs,
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THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 43323.

The defendant in the above-entitled cause hereby waives the issue of citation therein on appeal.

A. B. DUVALL,
Attorney for Defendant.

Memorandum.

May 21, 1900.—Appeal bond filed.

17 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 16, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 43323, at law, wherein Alice R. Mosheuvel *et al.* are complainants and The District of Columbia is defendant, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25th day of May, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1004. Alice R. Mosheuvel *et al.*, appellants, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Jun- 14, 1900. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

No. 1004.

ALICE R. MOSHEUVEL AND ANTHONY J. MOSHEUVEL, APPELLANTS,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANTS.

HENRY E. DAVIS,
CHAS. COWLES TUCKER,
For the Appellants.

LAW REPORTER PRINT.

IN THE

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DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANTS.

STATEMENT OF FACTS.

This is an action at law by the appellants as husband and wife against the appellee, the District of Columbia, to recover damages for injuries to the wife, caused by a defect in the sidewalk in front of their residence in the city of Washington. Their declaration, filed September 7, 1899, alleges that on August 7, 1899, there was a deep and dangerous hole in front of premises 113 E street northeast, caused by the wrongful and negligent failure of the District to provide a cap or cover for a certain water box or plug in the sidewalk at that point; that the hole was unguarded and had been allowed by the District to remain in such unsafe and dangerous condition for a period of about one year. That Mrs. Mosheuvel, on the date mentioned, while leaving or about to leave her residence, and while stepping or about to step on the sidewalk, and while exercising due care and diligence in so doing, stepped or slipped into the hole aforesaid and was severally injured.

The District filed a plea of not guilty, and upon a joinder of issue upon that plea the case went to trial on April 24, 1900. Testimony was offered by the plaintiffs and by the the defendant, and upon close of all the testimony the trial court granted a motion made by the defendant to direct a verdict in its favor; such a verdict was rendered over the objection of the plaintiffs, and from the judgment entered on the verdict, this appeal is taken.

The bill of exceptions is very short, consisting of four pages only of the printed record, and is made up almost entirely of Mrs. Mosheuvel's testimony, which the court below was of the opinion showed contributory negligence on her part such as to preclude a recovery. She described the water box, saying that it was in the sidewalk at the bottom of three steps which lead from a brick landing in her front yard to the sidewalk, and stated that there was no other means of leaving the house except by means of such steps; that on the occasion when she was injured she started to go to the house of a neighbor who lived two doors east of her house, and in going down the steps her foot slipped into the hole caused by the water box, which had no top or covering to it. The water box was not even with the sidewalk, but projected up, being higher from the pavement on one side than the other. It was, she thought, about five inches square, more or less, and its inner edge, as nearly as she could judge, was about six inches from the inner edge of the last step, and it looked to her as if the box was about in the middle of the step. She testified that on February 16, 1899, she wrote a letter to the Health Department in regard to certain plumbing defects in the house, and in response thereto an inspector came to the house on the following day. The box was in the condition described when the inspector came, and he saw it, as she knew from a remark that was made. She saw a lady stumble over the same place in the beginning of the summer of 1899. She then testified as to her injuries,

stating that she was severely hurt in the left foot and suffered severe internal injuries. Her foot was placed first in splints and then in a plaster case, and she has used crutches or a crutch ever since. She suffered a great deal, not only in her foot, but abdomen, and has been unable to work at her trade of dress making, from which, before she was injured, she derived an income of not less than thirty dollars per month. She has no use of her left leg at all and wears a rubber bandage on her ankle.

On cross-examination Mrs. Mosheuvel stated that she had lived in the house about nine months before she was injured, and the water box had always been in the condition it was on the day she hurt her foot; that she always watched out for the box because she thought that it was a dangerous place; that in passing up and down the steps she noticed the box and always tried to watch out for it, and in order to avoid it she tried to be a little careful in seeing where she was going; that she was no more careful one time than she was another; that every time she looked at it in the same way and tried to avoid it in the same manner; that she always succeeded in avoiding it except once when her heel slipped, and the time she was injured; that sometimes she would go to the side, sometimes she would step over it either to the right side or to the left side; that if you would go either to the right or the left it was not in your way; that in stepping over the box it would require an unusually long step, which is different from her ordinary step; that it depended upon which direction she was going; that when she stepped over the box, as she would sometimes do, she judged that she would have to take an unusually long step; that the time that the witness' heel slipped she attempted to step over it and did not succeed; that she was looking out for the box at all times; that it was in view from the time she left her front door until she reached the pavement; that on the day the accident happened, which was a fair day, she saw the water box when she started

walking down the steps, but did not keep her eye on it all the time she was descending, but had her mind on it and was perfectly conscious of its existence, and that it was a dangerous hole; that when she came down the steps going to her neighbor's house she had to turn to the east, and when she got to the bottom of the step, and when she was stepping down on the sidewalk she tried to be as careful then as she had on any other day; that she tried to be careful when she saw the box was there and tried to avoid the box every time; that she attempted on this occasion to make a turn to go to her right. She further testified as follows:

"Q. Did you try to make a step of such length as would carry your foot over the box?

"A. I tried; the same as always.

"Q. But you fail to know exactly what you did this time? Did you try to step over this box?

"A. First I thought my steps were even and would carry me over the box.

"Q. So you tried to take a step long enough to carry you over the box?

"A. Yes, sir; I did.

"Q. But you miscalculated and your toe caught in the box?

"A. Yes, sir; my toe caught in the box, which threw me to the pavement.

"Q. Which foot were you putting down first when you came to the bottom step?

"A. My right foot was on the last step and I turned to put my left foot down.

"Q. Did you attempt to turn before you got off the last step?

"A. My foot was on the last step and I turned to put my left foot down.

"Q. Did you attempt to turn before you got off the last step?

"A. No more than that I was coming off this step and I started to walk and turned, of course.

"Q. Did your foot go in the box sideways?

"A. That way (indicating). My toes went down.

"Q. Did your foot go into the box parallel with the steps?

"A. No, sir; cornerways.

"Q. Diagonally, you mean?

"A. Yes, sir.

"Q. So that you started to turn when you got on the last step?

"A. I had my right foot on the last step and went to put my left foot down and my foot went 'cata-corner' in the box.

She further testified on cross-examination that when the plumbing inspector came to the house in response to her letter she did not call his attention to the water box—he saw it himself; that she had not gone outside of her door before the accident on the day it had occurred; that up to the time she fell she had not been out of the house for a week; that she saw the box the last time she was out; that on the occasion she was injured she had nothing in her hand.

The plaintiffs also offered evidence to show that the water box in question had been without a top or covering at least two years prior to the accident, and also medical evidence tending to show the character and extent and probable permanency of the female plaintiff's injuries.

Upon the close of the plaintiff's testimony the defendant offered evidence tending to show that the three front steps, at the foot of which the water box was located, were three feet eight inches in width; that its dimensions were four inches by four inches; that its east side was sixteen inches from the east end of the steps, and its west side twenty-four inches from the west end of the steps; that its north side was four inches from a line drawn from the tread of the steps nearest the sidewalk to the ground, and that a person five feet tall could see the water box while standing on the porch at the front door of the plaintiff's residence.

Upon the close of the evidence the defendant prayed the

court to direct the jury to return a verdict for the defendant, and the court granted such prayer, and so instructed the jury; to which ruling and direction of the court the plaintiffs excepted.

ASSIGNMENT OF ERRORS.

1. That the trial court erred in granting the defendant's prayer at the close of the testimony and in directing the jury to return a verdict in its favor.

2. That the trial court erred in holding that upon the evidence the female plaintiff was guilty of contributory negligence in law and was, therefore, not entitled to recover.

ARGUMENT.

I.

The court below held that the female plaintiff's own testimony showed that she was guilty of contributory negligence *in law* and, therefore, not entitled to recover.

What is or is not contributory negligence in law is almost always a perplexing and difficult question. This court in *Railroad Co.* v. *Grant*, 11 App. D. C. 114, has said:

> "The cases are but few where the court can undertake to decide upon the evidence, *as matter of law*, that there is such contributory negligence as will preclude the plaintiff from recovering. As a general principle, it is only where the circumstances of the case are such that the standard and measure of duty are fixed and defined by law, and are the same under all circumstances; or where the facts are undisputed, and but one reasonable inference can be drawn from them, that the court can interpose and declare, *as matter of law*, that there is such contributory negligence as will defeat the action of the plaintiff. As a general proposition, a question of negligence is a question of fact, and must be submitted to the jury."

Judge Cooley in *Railroad Co.* v. *Van Steinburg*, 15 Mich. 120, in discussing the same subject, said:

> "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility. For when the judge decides that a want of due care is shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury."

And Judge Cooley in this opinion cites the following language of the court in *Railroad Co.* v. *Heilman*, 49 Penna. 63:

> "That what constitutes negligence in a particular case is generally a question for the jury and not for the court, is undoubtedly true, because negligence is want of ordinary care. To determine whether there has been any involves, therefore, two inquiries: First, What would have been ordinary care under the circumstances; and, Second, Whether the conduct of the person charged with negligence came up to that standard. In most cases the standard is variable and it must be found by a jury. But when the standard is fixed—when the measure of duty is

> defined by law—entire omission to perform it is negligence. In such a case, the jury has but one of these inquiries to make. They have only to find whether he upon whom the duty rests has performed it. If he has not, the law fixes the character of his failure and pronounces it negligence."

In the light of these expositions of the rule relating to contributory negligence in law, and of the further principle that the burden is upon the defendant to show either by affirmative testimony, or from the plaintiff's own testimony, that the plaintiff has been guilty of contributory negligence, does this record disclose such a case as should not have been submitted to the jury? In the language of the Pennsylvania case, "What would have been ordinary care under the circumstances" on Mrs. Mosheuvel's part, and did her conduct come up to that standard? Her duty was to use the care which an ordinarily prudent woman of her physical and mental capacity, and age, would have exercised under similar circumstances. Is there anything in the record to show that such a person would have exercised greater care than she did? She was before the jury and testified. They saw what kind of a woman she was—had the opportunity of guaging her mental and physical faculties—and were even better fitted, we respectfully submit, than the trial judge himself, to say what degree of care and prudence such a woman would ordinarily exercise.

What is there in the testimony to show that she acted negligently? She alone testified and it is in her own testimony, if at all, that evidence of negligence must be found.

She knew of the existence of the hole in the sidewalk at the bottom of her front steps, but, as will be presently shown, mere knowledge by the person injured of a dangerous defect will not preclude recovery. She had no other means of egress from her house than by means of the steps at the foot of which the hole was located. She had lived in the house for nine months and prior to the time she was

injured had safely passed the hole every time she left or entered her home, except once when she stumbled in it, on which occasion she did not hurt herself. She says she knew the hole was dangerous and for that reason was always careful to avoid it. On the occasion when she was injured she says she was as careful as she had ever been on prior occasions when she escaped injury; that she thought her steps were even and would carry her over the box; that she miscalculated and her toe caught in the box; that she put her right foot on the last step, turned to go in an easterly direction towards her neighbor's house, and put her left foot to the pavement when her toe caught in the box diagonally and she was thrown to the ground.

She was not charged with the duty of exercising extraordinary care.

When the negligence of the defendant is conceded, the trial court is not justified in directing a verdict for the defendant because the acts of the plaintiff show that, in some degree, he may not have been as careful as the most cautious and prudent man would have been.

Jones v. *Railroad Co.*, 128 U. S. 443.

If on the occasion of her injury it had not happened that Mrs. Mosheuvel intended going in an easterly direction she would probably have escaped injury, for she would have stepped over the hole. It should be borne in mind that the hole was only 4x4 inches and was situated at its nearest point only four inches from a line drawn to the pavement from the tread of the last step. It was not a deep and wide trench which it would be dangerous for anyone to try to pass.

II.

The trial court in effect held that the District may with impunity permit a dangerous hole to exist in a sidewalk in such a location as to prevent safe entrance and egress of the

occupants of a dwelling house, because the knowledge which such occupants are bound to have by their constant use of the entrance to their house of the existence of the hole, will prevent them from recovering damages if they are injured. Although they may urge that they were careful and endeavored to avoid injury—as the female plaintiff here does—they are to be told that this can not be true as a matter of law, and it would, therefore, be improper to permit the jury to say that it was not negligence as a matter of fact. The only course for them to pursue is to remain in doors, for the court says that it is negligence not to do so in view of the dangerous hole which they know to exist in front of their house and which the municipality permits to remain there. We submit that this is not law. The true rule is that every occupant of the house has a right to use the sidewalk, but if he has knowledge of a defect therein he is chargeable with a greater degree of care than if he did not have such knowledge. Whether, having such knowledge, he is in a given case guilty of contributory negligence depends, first, upon the character of the defect, and, secondly, upon the care he used in attempting to avoid injury. If the defect be a deep and dangerous trench, his duty to exercise care would be greater than if the hole were a small one and one he has repeatedly passed and repassed without injury.

In *Williamsport* v. *Lisk*, 21 Ind. App. 414, the court states the rule thus:

> "A person using a street known to him to be defective is bound only to use care commensurate with the known danger, and he is not precluded from recovering for injuries received therefrom because he had knowledge of such defect."

The following are authorities upon the question under consideration:

One injured upon a street he knew to be dangerous need not show that he exercised *extraordinary* care while upon

such street. *Hanlon* v. *Keokuk*, 7 Iowa, 488. *A fortiori* he is not obliged to keep off from such a street altogether. *Rice* v. *Des Moines*, 40 Iowa, 638; *Reed* v. *Northfield*, 13 Pick. 94. One may proceed, if it is consistent with reasonable care to do so; and his negligence is generally a question for the jury, depending upon the nature of the obstruction, or insufficiency of the highway, and all the surrounding circumstances. *Kelly* v. *Fon du Lac*, 31 Wis. 179. Mere miscalculation as to one's proximity to the known dangerous part of a highway will not have the effect of establishing conclusively a want of ordinary care. *Blood* v. *Tyngsborough*, 103 Mass. 509. Mere error of judgment does not necessarily amount to contributory negligence. *McClain* v. *Railroad*, 116 N. Y. 459. The rule is that a person having knowledge of a defect or obstruction is bound to use care according to the circumstances to avoid injury. *Smith* v. *Smith*, 2 Pick. 621; *Thompson* v. *Bridgewater*, 7 Pick. 188; *Rindge* v. *Coleraine*, 11 Gray, 157; *Crumpton* v. *Solon*, 11 Me. 335; *Jacobs* v. *Bangor*, 16 Me. 187; *Garmon* v. *Bangor*, 38 Me. 443; *Noyes* v. *Morristown*, 1 Vt. 353; *Folsom* v. *Underhill*, 36 Vt. 580; *Koch* v. *Edgewater*, 14 Hun, 544; *Nicks* v. *Marshall*, 24 Wis. 139; *Earleville* v. *Carter*, 2 Bradw. 34; *Craig* v. *Sedalia*, 63 Mo. 417; *Moore* v. *Shreveport*, 3 La. Ann. 645.

Accordingly, if the obstruction or defect in the highway is of such a nature that it will be consistent with reasonable care to attempt to pass by it, one using the highway is entitled to make the attempt. *Thomas* v. *Western Union Tel. Co.*, 100 Mass. 156–158, per HOAR, J.; *Fox* v. *Glastenbury*, 29 Conn. 204.

Where commissioners of sewers had made a dangerous trench in the passageway from certain premises, and heaped rubbish upon the remainder of the way alongside the trench, a person was not as a matter of law prevented from recovering damages for the loss of a horse which fell into the trench while he was endeavoring to lead it through the passageway

contrary to express warning of danger at the time. *Clayards* v. *Dethick*, 12 Adolphus and Ellis, 439; 64 Eng. Com. Law R. 437. In that case the several judges before whom the case was tried, used language which is peculiarly applicable to the case at bar. Lord Chief Justice DENHAM, the trial judge, in summing up (p. 441)—

> "left it to the jury, in the first place, to say whether the defendants had been guilty of culpable negligence in not fencing the trench. His Lordship then observed that, if the defendants' witnesses were to be believed, and the plaintiff on the second occasion had, in defiance of warning, incurred an evidently great danger, this was rashness on his part which would excuse the defendants; but it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous; that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger; though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained. And he left it to the jury to say whether or not the plaintiff has so acted. Verdict for the plaintiff; damages, 20*l.*"

When the case was heard in the Queen's Bench, PATTERSON, J., said (page 445):

> "Now, the defendants clearly had no right to leave a trench open in the passage to this mews without a proper fence, and, having done so, to tell the plaintiff, 'you shall keep your horse in the stable until we inform you that you may remove him.' But whether or not the plaintiff contributed to the mischief that happened by want of ordinary caution, is a question of degree. If the danger was so great that no sensible man would have incurred it, the verdict must be for the defendants, and the case was rightly put to the jury as depending upon this question. The plaintiff here had passed safely

in the afternoon over the place at which the accident happened. According to the evidence for the defendants, he was told, on attempting to pass in the evening, that he could not do it without danger to himself and the men below. The jury, however, do not appear to have believed this statement. The whole question was whether the danger was so obvious that the plaintiff could not with common prudence make the attempt. That was properly put to the jury, and they have found for the plaintiff."

(See, also, the remarks of COLERIDGE, J., in the same case.)

To the same effect is *Baltimore* v. *Holmes*, 39 Maryland, 243, which was a suit brought to recover damages for injuries sustained by the plaintiff in attempting to lead his horse, attached to a carriage, over a pile or ridge of stones, which the defendant had negligently allowed to obstruct one of the public streets in the city of Baltimore. The court, by ROBINSON, J., said (page 249):

"The question of negligence both on the part of the plaintiff and defendant, was fairly put to the jury. The defendant contends, however, that the attempt on the part of the plaintiff to lead his horse over the pile or ridge of stones, was such a *glaring act of carelessness as to amount in law* to contributory negligence, and that the court erred in refusing so to instruct the jury. Negligence is the want of such care as men of ordinary prudence would use under similar circumstances; and the question as to whether the act of the plaintiff *amounted in law to negligence*, depended upon the danger which might reasonably be expected to result therefrom. If the danger was so great that no sensible man would have incurred it, the plaintiff was not entitled to recover, but this, of course, raised a question of fact, which we think was properly submitted to the jury."

See, also, *Kane* v. *Northern Cent. RR.*, 128 U. S., p. 94; *Coms.*

of Prince Georges Co. v. *Burgess*, 61 Md. 31; *County Commissioners* v. *Broadwaters*, 69 Md. 533; *Nichols* v. *Laurens*, 96 Iowa, 388; *Fitzgerald* v. *Conn. River Paper Co.*, 155 Mass. 155.

In *East Saint Louis* v. *Donahue*, 77 Ill. App. 574, the court said:

> "If, as seems to be contended [by the city] a person knowing a sidewalk to be out of repair and attempting to travel on it, does so at his own risk of being injured, the contention [that the plaintiff was guilty of contributory negligence] is correct. In this case, as in thousands of others, the occupants of premises are so situated that they can not leave their own doors without going over sidewalks which are more or less out of repair, and must it be said that if they do leave under such circumstances, they are remediless if they are injured on a sidewalk that a city knows to be defective, no matter how careful they may have been in traveling it?".

The court then distinguishes the case of *Kewanee* v. *Depew*, 80 Ill. 119, which was cited by the appellee at the trial below and will doubtless be cited on this appeal, and proceeds:

> "It is not the law that a person who receives an injury on account of a defective sidewalk is precluded from recovering damages therefor merely because of previous knowledge of the defect; but such knowledge is an element for the jury to consider in determining the question of ordinary care. It is true that the appellee did not testify in terms that she was exercising ordinary care at the time she was so injured, and had she done so such testimony would have been improper. The question of whether she was exercising ordinary care for her own safety could only be determined from the facts and circumstances surrounding and connected with the accident and these were in evidence before the jury and were such as to warrant the jury in finding as they did."

In Beach on Contributory Negligence (2d Ed., Sec. 247) it is said:

> "When a highway is out of order, it is held as a general rule not negligence to use it in as prudent a way as practicable, which is to say that using a defective highway is not negligence as a matter of law. It would be an extraordidary rule that made it negligence not to stay indoors whenever the highway is out of repair."

See, also, Sherman & Redfield on Neg., Sec. 376.

> "If a person knows of a defect in a walk, but believes that it can be passed in safety with the exercise of ordinary care, he is justified as a reasonably prudent man in holding that belief, and he is not negligent in attempting to pass over it in an ordinarily careful manner."

Graham v. *Oxford*, 105 Iowa, 709, citing—
Barnes v. *Marcus*, 96 Iowa, 675.

> "The mere fact that the plaintiff in an action to recover damages caused by a defect in a sidewalk had previous knowledge of such defect—frequently saw it, and considered it to be dangerous—does not establish contributory negligence as a matter of law, but it is a question for the jury."

Crites v. *New Richmond*, 98 Wis. 55; citing *Slager* v. *Milwaukee*, 97 Wis. 471; *Simonds* v. *Baraboo*, 93 Wis. 40.

> "The case seems to have been tried on the theory that mere knowledge on the part of the plaintiff as to the condition of the walk was an absolute protection to the city against all accidents resulting to her from such defect, a proposition which, if followed to its logical ending, would make the notorious misconduct of a city in abandoning its streets and walks an absolute shield against its grossest neglect, and the open defiance of its plainest duty an exemption from liability from the consequences thereof.

The mere admission on the part of the plaintiff that she knew of the defective condition of the walk at the time of and for a long period before she received her injury, does not of itself constitute want of care on her part in the act of using the same, and it is not to be held as conclusive evidence of negligence on her part such as to warrant the giving of a peremptory instruction by the trial court, as was done in this case."

Graney v. *St. Louis,* 141 Mo. 185.

"The rule that one is not bound to refrain from traveling upon a highway because he knows it would be dangerous, is specially applicable in a case where the highway is the only one which affords egress from and access to his home, and his use of it in question was in returning to his home."

Seybold v. *Railroad Co.*, 18 Ind. App. 390, citing *Railroad Co.* v. *Crist,* 116 Ind. 446, in which latter case the court said:

"The plaintiff was not bound to refrain entirely from using the only highway which gave her access to her home or led from it."

"Nor do we think there was any ground for saying that she [the female plaintiff] was guilty of negligence because she attempted to pass along the walk there, well knowing its dangerous condition. She was passing along with due caution—as we must assume after the the verdict of the jury—one of the public streets of the city, which was defective and out of repair. She had passed there many times before safely, notwithstanding its dangerous condition, and because she attempted to do so again, we are asked to hold as a matter of law, that she was guilty of negligence that contributed to the injury. This we can not do."

Kavanaugh v. *Janesville,* 24 Wis. 619; followed in 30 Id. 392; 53 Id. 626; 54 Id. 433; 54 Id. 687; 56 Id. 242; 56 Id. 274; 60 Id. 320; 61 Id. 531; 60 Id. 666.

In Massachusetts this is also the rule: See *Reed* v. *Northfield*, 13 Pick. 94; *Smith* v. *Lowell*, 6 Allen, 39; *Snow* v. *Railroad*, 8 Id. 441, 450; *Frost* v. *Waltham*, 12 Id. 85; *Fox* v. *Sackett*, 10 Id. 535; *Mahoney* v. *Railroad*, 104 Mass. 73; *Lyman* v. *Amherst*, 107 Mass. 339; *Whitaker* v. *Boylston*, 97 Id. 273.

And also in Pennsylvania: *Humphreys* v. *Armstrong Co.*, 36 Penna. St. 204.

In Missouri: *Swith* v. *St. Joseph*, 55 Mo. 449.

In Iowa: *Rice* v. *Des Moines*, 40 Iowa, 638.

In New Hampshire: *Griffin* v. *Auburn*, 58 N. H. 121.

In Minnesota: *Erd* v. *St. Paul*, 22 Minn. 443.

In Illinois: *Aurora* v. *Dale*, 90 Ill. 46.

In Connecticut: *Dooley* v. *Meriden*, 44 Conn. 118.

In Indiana: *Turnpike Co.* v. *Jackson*, 86 Ind. 111.

In Vermont: *Coates* v. *Canaan*, 51 Vt. 131.

In Alabama: *Montgomery* v. *Night*, 72 Ala. 411.

In New York: *Bullock* v. *New York*, 99 N. Y. 654; *Pomfrey* v. *Saratoga*, 104 N. Y. 459.

In Virginia: *Noble* v. *Richmond*, 31 Gratt. 271.

See, also, cases cited elsewhere in this brief from these and other States, and also, *Corts* v. *Dist. of Col.*, 18 D. C., p. 288, and *Muller* v. *Dist. of Col.*, 5 Mackey, 286, in which latter case, the Supreme Court of this District, in an opinion delivered by Mr. Justice Cox, said:

> "The law on the subject throws on the defendant, in an action of this kind, the *onus* of proving contributory negligence, and that proof is not made out by merely showing the knowledge by the complainant of the defect complained of in the highway. If the highway is wholly impassable and in such condition that no reasonable man would attempt to pass it, the plaintiff does it at his own risk. But if it is not, and especially if it is *the only access to his dwelling*, the only duty on his part is the exercise of proper care to avoid accidents, and the burden is upon the defendant not only to show knowledge of the defect on

> the part of the plaintiff, but to show, affirmatively, negligence, or the omission to take the proper care."

Mere knowledge of a defect in a street will not preclude recovery from injury received:

Whitford v. *Southbridge*, 119 Mass. 564; *Stevens* v. *Walpole*, 76 Mo. App. 226; *Griffin* v. *Lewiston*, 55 Pac. 545; *Schwingschlegl* v. *Monroe*, 113 Mich. 683; *Frankfort* v. *Coleman*, 19 Ind. App. 373; *Boulton* v. *Columbia*, 71 Mo. App. 523; *Waltemeyer* v. *Kansas City*, 71 Mo. App. 358; citing *Gerdis* v. *Iron & Foundry Co.*, 124 Mo. 347; *Taylor* v. *Springfield*, 6 Mo. App. 263; *Bouga* v. *Weare*, 109 Mich. 520; *Nichols* v. *Laurens*, 96 Iowa, 388; *Albion* v. *Hetrick*, 90 Ind. 545; *Sandwich* v. *Dolan*, 141 Ill. 430, citing 136 Id. 45; 138 Id. 465; *Gosport* v. *Evans*, 112 Ind. 133; *Columbus* v. *Strassner*, 124 Ind. 482.

Whether the plaintiff who was injured by falling into an open grating or hole in a sidewalk, was guilty of negligence in walking upon one part of the sidewalk rather than upon another was "certainly not a question of law, and was properly left to the jury."

Lincoln v. *Power*, 151 U. S. 441.

III.

It will be urged by the appellee that the case at bar is controlled by the opinion of this court in *Brewer* v. *District of Columbia*, 7 App. D. C. 113. In that case the plaintiff was injured through a defect in a plank sidewalk on Brown street, Mount Pleasant, while returning to his home in Mount Pleasant, having gone to his home by the way of that street instead of by Centre street, as he could have done. This court say (page 115):

> "His own testimony shows that he knew of the dangerous place in the sidewalk, and that it had not been repaired. He knew that, covered as it was with snow, it had been rendered more dangerous.

> The night was clear, the street lighted, and he preferred taking the risk of the sidewalk to walking through the deep snow on another street. He mounted the two steps at the beginning of the sidewalk with safety; and realized fully when he had reached the dangerous place where there was a cut of about ten inches in the walk. He stopped, he said, and 'stepped back so as to get an idea where he was, thinking there would be a little dirt there; that he stepped back a little and went to walk across, and he then slipped, and, turning round, tried to catch himself, fell across the corner of the board.' He did not step off at the roadway suddenly or unexpectedly and thus receive the fall. His foot slipped upon the board and he fell across the corner. A similar accident might have befallen him had he slipped at some other point and fallen from the raised boardwalk. But, be that as it may, he deliberately took the risk of walking along this dangerous sidewalk and received his injury in so doing. As this plainly appears from the testimony of the plaintiff himself, who seems to have testified with perfect fairness, and there was no other evidence, the court should have instructed the jury to return a verdict for the defendant."

We do not understand that it was the intention of this court in the *Brewer* case to hold that mere knowledge of a dangerous defect in the sidewalk would preclude recovery by a person who was injured. Such a ruling would be contrary to the great weight of authority as found in the reports and text books. We take it that the court intended to go no further than to say that, in view of the particular circumstances of that case, the fact that the plaintiff had knowledge of a dangerous defect in a sidewalk, and yet chose to make use of the sidewalk at night and at a time when he knew that the danger was increased by the presence of snow thereon, instead of using another route which was perfectly safe, precluded him from recovering. And, as the court

points out, it was even unnecessary to go so far, for the reason that as is said in the opinion (p. 116):

> "A similar accident might have befallen him had he slipped at some other point than that where the defect existed, and fallen from the raised board walk."

The circumstances of the *Brewer* case so obviously differ from those of the case at bar, that we can not see how it can be called controlling even by a most constrained construction of the opinion. This case, it seems to us, is as readily distinguishable from the *Brewer* case, as was the case of *Crumbaugh* v. *Dist. of Col.*, 13 App. D. C. 553, which the District insisted was governed by that case, but which this court distinguished therefrom.

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